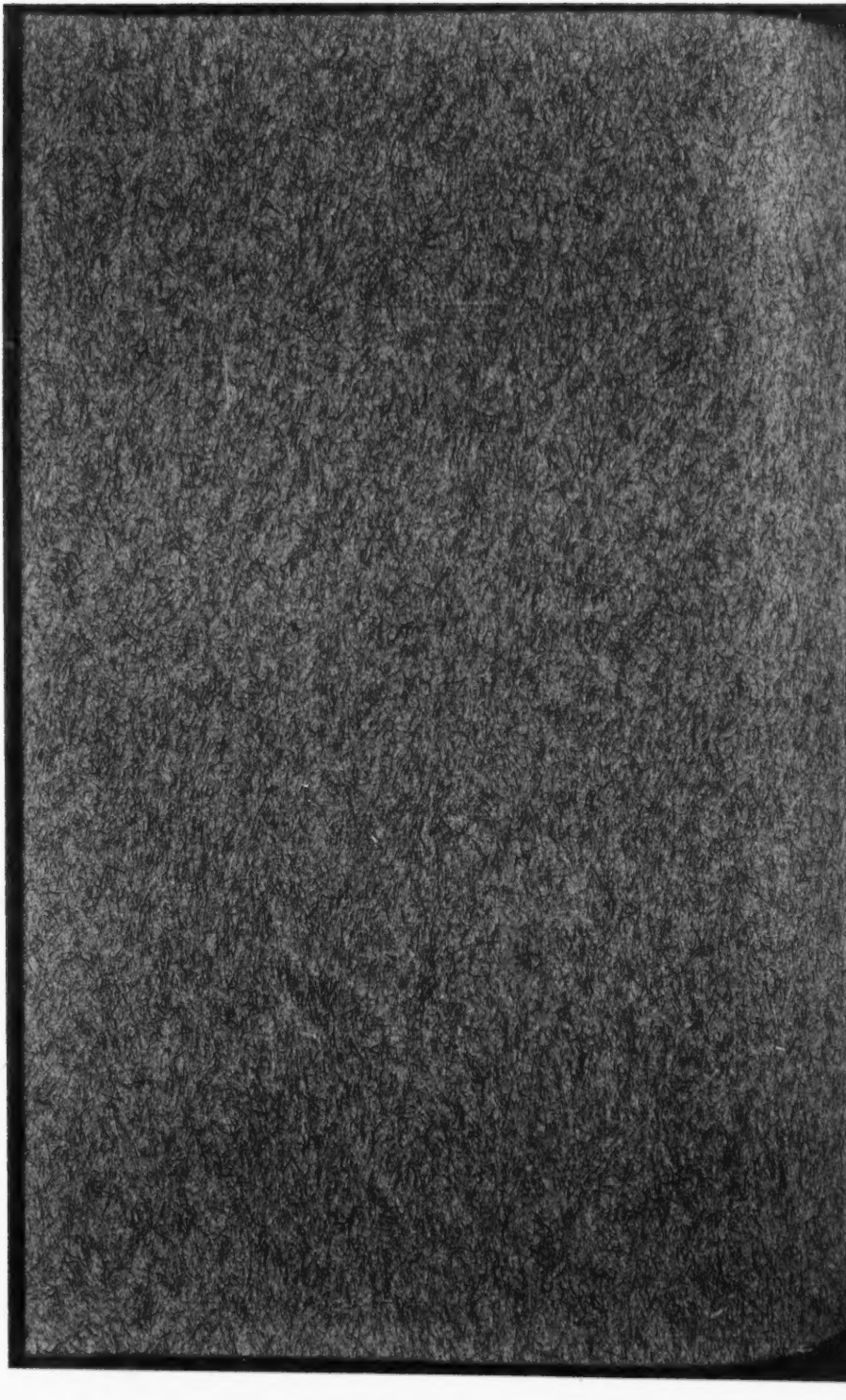
No. 484

In the Supreme Court of the United States

October Term, 1944



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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 484

ANTHONY JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 57–59) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 15, 1944 (R. 53). The petition for a writ of certiorari was filed September 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a stipulation between petitioners' attorneys and Government counsel filed before trial, admitting a fact which constitutes an element of the offense, is an extra-judicial confession requiring corroboration.

STATUTE INVOLVED

Sections 201 (f), 301 (a), and 402 (a) of the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040; 21 U. S. C. 321 (f), 331 (a), 342 (a), provide in part:

> SEC. 201 (f). The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.
>
> SEC. 301. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> SEC. 402. A food shall be deemed to be adulterated * * * (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; * * *

STATEMENT

In June, 1943, in the United States District Court for the Southern District of California, the United States Attorney, with leave of the court, filed an information in two counts, each charging a violation of the Federal Food, Drug, and Cosmetic Act in that, on separate occasions, petitioner had unlawfully introduced and delivered for introduction in interstate commerce a consignment of food labeled as Prune Concentrate Juice which was adulterated in that it consisted in whole or in part of a filthy substance and had been prepared under insanitary conditions (R. 3–7). On October 13, 1943, petitioner entered a plea of not guilty to both counts (R. 7–8).

Prior to the trial, on November 2, 1943, the attorneys who then represented petitioner entered into a stipulation with government counsel (R. 8–15) in which it was stipulated, *inter alia,* that on the dates alleged in the information, petitioner had introduced and had delivered for introduction into interstate commerce certain quantities of prune concentrate juice and that such concentrate "was a food within the meaning of the Federal Food, Drug and Cosmetic Act" (R. 9, 11). The stipulation was filed on November 6, 1943 (R. 15). On November 9, the day of the trial, petitioner substituted new attorneys for those who had signed the stipulation (R. 15–16, 43). At the opening of the trial, without prior

notice to the Government, these new attorneys made a motion to have petitioner relieved from that portion of the stipulation which admitted that the prune concentrate juice was a food within the meaning of the statute, stating that the particular shipments charged in the information were manufactured for the purpose of being reprocessed by the consignee into a finished product (R. 44–45). Government counsel opposed the motion, stating that the attorneys who had formerly represented petitioner were fully aware of the nature of the product, having previously inspected petitioner's plant and having represented petitioner at a hearing before the Federal Food and Drug Administration involving the same product; that petitioner had been informed of the contents of the stipulation; that in the event he was relieved therefrom the Government would be obliged to obtain the testimony of the consignee in Hartford, Connecticut, to show his use thereof as a food in the manner advertised by petitioner in a circular which stated that the syrup was a topping for ice cream (R. 44–45). The court denied petitioner's motion and no exception was taken to the court's ruling (R. 46). The admission that the concentrate was a food was called to the attention of the jury by the Government (R. 46). There was no other evidence that the product was a food except that a Government witness testified that the samples of prune concentrate

juice taken from the shipment which was the basis for count 1, consisted of a "heavy, dark brown, sticky, heavy liquid similar to crude molasses, the consistency I believe of heavy molasses" (R. 47), and another Government witness testified that the drums from which these samples were taken "contained a heavy syrupy like, dark juice or syrup" (R. 47).

Petitioner's motion for a directed verdict, at the close of the Government's case, was denied (R. 16) and he was found guilty on both counts (R. 17, 18). A motion for a new trial was denied (R. 18–25, 27, 48–49). Petitioner was sentenced to pay a fine of $250 on the first count and on the second count imposition of sentence was suspended for one year and petitioner was placed on probation for that period (R. 28–29). On appeal, the judgment was affirmed (R. 53).

ARGUMENT

Relying upon the cases which hold that an extra-judicial confession or admission is insufficient to support a conviction without independent corroboration of the corpus delicti, petitioner contends (Pet. 5–6, 8–10) that the evidence is insufficient to support his conviction for the reason that the corpus delicti of the crime, the interstate shipment of food, was proved by the stipulation entered into between his former counsel and the Government. The circuit court of appeals, upon the erroneous assumption that petitioner had failed

to move for a directed verdict, thought that this objection was not open to him, but stated that in any event the stipulation did not require corroboration (R. 58; but see R. 16 and petitioner's supplemental brief in this Court, p. 4). This holding is clearly correct. A stipulation between counsel dispensing with the necessity of proof as to facts is a judicial, not an extra-judicial admission. See *Andrews* v. *St. Louis Joint Stock Land Bank,* 127 F. (2d) 799, 804 (C. C. A. 8), certiorari denied, 309 U. S. 667; Wigmore on *Evidence,* 3d ed. sec. 2588. As this Court explained in *Warszower* v. *United States,* 312 U. S. 342, 347, the rule requiring corroboration of a confession is designed to guard against the danger of untrue confessions. A formal stipulation entered into by counsel has no more of the "inherent weaknesses of confessions or admissions after the fact" than the inconsistent statements prior to the crime involved in the *Warszower* case. Cf. *Hill* v. *Federal Trade Commission,* 124 F. (2d) 104 (C. C. A. 5), where the court stated that "judicial admissions are proof possessing the highest possible probative value." It is interesting to note that Rule 15 of the proposed Rules of Criminal Procedure specifically provides for procedures substantially the same as that followed here. Since a person accused of crime can, without the necessity of corroboration, be convicted upon a plea of guilty which constitutes a judicial admission of all elements of the offense, there is no reason why a

judicial admission of one element of the offense should require corroboration. Cf. *Cooper* v. *State,* 123 Neb. 605 (1932). The stipulation here involved was a formal document entered into by petitioner's then attorneys after full opportunity to acquaint themselves with the facts and was formally filed as a part of the record in this proceeding (see pp. 3–4, *supra*). It clearly is not within the rationale of the rule requiring corroboration of extra-judicial confessions.[1]

---

[1] Petitioner also raises (Pet. 5, 8), but does not argue the question whether it was an abuse of discretion on the part of the trial judge to refuse his application to be relieved from that part of the stipulation which admitted that the product which he shipped was food. Petitioner's attorneys did not, at the trial, object to the judge's ruling, and the circumstances disclosed on the argument of the motion (see pp. 3–4, *supra*) show clearly that there was no abuse of discretion on the part of the trial judge (cf. *Jones* v. *United States*, 72 F. (2d) 873, 874 (C. C. A. 7)). The ground of petitioner's motion was that the particular shipments involved were intended for reprocessing by the consignee (R. 44, 45). Since it is well established that the subsequent use to be made of a product does not change its character as food at the time of the interstate shipment (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *52 Drums Maple Syrup*, 110 F. (2d) 914 (C. C. A. 2)), it is evident that petitioner did not present any meritorious ground for his application. By petitioner's own admission in his motion for a new trial the product, even if not used in the form in which it was shipped, would, in the normal course of business, be distributed to the retail trade as a beverage after further processing (R. 22–23). It was therefore, as the stipulation admitted, a food within the meaning of the Food, Drug, and Cosmetic Act, defining food as an "article used for food or drink for man or other animals * * * and articles used for components of any such article" (Sec. 201 (f), p. 2, *supra*).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
BEATRICE ROSENBERG,
WILLIAM STRONG,
Attorneys.

NOVEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

Office - Supreme Court, U. S.
FILED
OCT 20 1944
CHARLES ELMORE CROPLEY
CLERK

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

STROTHER P. WALTON,
RALPH ROBINSON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion

No opinion was filed at the time the original Petition for Writ of Certiorari and Brief was filed herein, but subsequent thereto and on the 21st day of September, 1944, an opinion was ordered filed in the United States Circuit Court, a copy of the same being printed in this record under the caption "Supplemental Transcript of Record".

II

The Jurisdictional features, the Statement of the Case, Specification of Errors, Question Presented, Statutory Provisions Involved, Summary of Argument and Argument are all covered in the original brief now on file to which reference is hereby made.

III

Additional Question Presented

The only question which has not already been argued is that which appears to be raised in the opinion recently filed,

1. Has the petitioner lost his right to raise the question of error by reason of his failure to reserve an exception to the ruling of the Court?

IV

Argument

The record shows that the stipulation was entered into on November 2d, 1943, between attorneys representing the petitioner and the United States' attorney wherein it was stipulated among other things that the product referred to was a food within the meaning of the Federal Food, Drug and Cosmetic Act (see Pages 9 & 10, Tr. of Record) which stipulation was entered into without the knowledge of the defendant and petitioner herein. (Tr. page 22). A stipulation was also entered into by counsel for the defendant, who subsequently withdrew from the case and the present attorneys being substituted therefor. (Tr. Page 43).

Before the trial commenced a motion was made by the defendant and petitioner in open court to be relieved of those portions of the stipulation previously entered into by former counsel wherein it was admitted in connection with both counts of the information that the prune concentrate juice, which was the product shipped by the defendant into interstate commerce, was a food within the meaning of the Federal Food, Drug and Cosmetic Act, and the matter was thereupon argued before the Court and outside the presence of the jury. (Tr. Page 44).

The Court after considerable argument and discussion denied the motion; no exception being taken by the defendant to the Court's ruling. (Tr. page 46).

The Court is thoroughly familiar with the rule that exceptions are taken and formerly preserved to determinations by the trial court in order that the same may be called to the Court's attention and that the Court have an opportunity to correct its error.

It was apparent to counsel in this case that the Court had definitely made up its mind and had ruled after thoroughly considering the matter, and it would have been a useless act to have required that counsel reserve an exception to the Court's ruling.

It is also well recognized exception to the general rule which requires that exceptions be taken to any ruling of the court which is to be challenged on appeal, and that is in criminal cases involving the life or liberty of the accused, the appellate courts of the United States may notice and correct serious errors in the trial of the accused, fatal to his rights, although these errors are not challenged or reserved by objections, motions, exceptions, or assignments of error. The case at bar is such an action.

Bogileno vs. *U. S.*, 38 F. (2) 584-587;
Van Gorder vs. *U. S.*, 21 F. (2) 939-942;
Lamento vs. *U. S.*, 4 F. (2) 901.

In the opinion filed herein Judge Wilbur states:

> "The appellant argues that there was no evidence on the second count except the stipulation and therefore it cannot be considered as sufficient evidence of the crime without further proof of the corpus delicti. The proper way to raise this question in the lower court would be by motion for a directed verdict. None was made and consequently the question is not before us."

On this point we would like to refer this Honorable Court to the following language which appears on Page 16 of the Transcript:

> "Attorney Robinson moves for a directed verdict of not guilty, states the grounds thereof, and argues. Attorney Walton argues. Attorney Kluckhohn argues in opposition. Attorney Robinson argues further. The motion is denied and an exception noted for the defendant."

V

Conclusion

It is therefore submitted that the question of whether or not the corpus delicti of a crime can be proven solely by a stipulation, or whether the same should be governed by the same rules as confessions and admissions in criminal cases was properly before the United States Circuit Court, who failed to pass upon the same.

And further that it would have been a useless act to have required the defendant to preserve an exception to the ruling of the trial court made prior to the commencement of the trial wherein the said trial court did deny the defendant's motion to be relieved of that portion of the stipulation which admitted that the product shipped into interstate commerce was a food within the meaning of the Federal Food, Drug and Cosmetic Act.

That to such an end the Writ of Certiorari should be granted and that this Court should review the judgment of the Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

Respectfully submitted,

RALPH ROBINSON,
STROTHER P. WALTON,
Attorneys for Petitioner,
Pacific Southwest Building,
Fresno, California.

October 10th, 1944.

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